In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-364

JOHN DAVID LIND,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

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Petitioner, John David Lind, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered August 8, 1977.

Opinion Below

The Opinion of the Court of Appeals for the Seventh Circuit has not been published in the official reports. A copy of the Opinion is attached hereto as Appendix A. (App. 7).

Jurisdiction

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on August 8, 1977.

Jurisdiction is conferred upon this court by 28 U.S.C. §1254(1) to review the judgment of a Court of Appeals by writ of certiorari.

Question Presented for Review

I. WHETHER THE COURT BELOW APPLIED THE APPROPRIATE STANDARD WHEN MEASURING THE EFFECT OF THE TRIAL COURT'S ERRONEOUS ADMISSION OF CERTAIN PORTIONS OF TAPED CONVERSATIONS BETWEEN THE PETITIONER AND A GOVERNMENT INFORMANT.

Statutes Involved

18 U.S.C. §§371, 842(h), 844(i), 924(c); 26 U.S.C. §§5861(d), 5871. The text of those sections is attached hereto as Appendix B. (App. 20).

Statement of the Case

The Petitioner, John D. Lind, was named as defendant in a nine count indictment which charged various offenses in connection with the bombing of a business enterprise in Anderson, Indiana, including illegal use and possession of explosives and obstruction of justice. Specifically he was charged with violations of the following sections of the United States Code:

> 18 U.S.C. §371 (Count I); 26 U.S.C. §§5861(d), 5871 (Count II); 18 U.S.C. §924(c) (Count III); 18 U.S.C. §924(c); (Count IV); 18 U.S.C. §844(i) (Count V); 18 U.S.C. §844(i)) (Count VI); 18 U.S.C. §842(h) (Count VII); 18 U.S.C. §371 (Count VIII); 18 U.S.C. §1510 (Count IX).

Petitioner's motion for judgment of acquittal was granted with respect to Counts III, IV and VIII of the indictment, and the jury returned verdicts of guilty with respect to Counts I (conspiracy), II (possession of an unregistered firearm), V (attempt to destroy property by means of an explosive), VI (attempt to destroy property by means of an explosive) and VII (storing and concealing stolen explosives).

Much of the government's case dealt with the surveillance of the Petitioner a number of days after the bombing in question. (T. 949-1036, 1095-1236, 1361-1373). During the course of the surveillance, one Gary W. Lake, who prior to his arrest on September 28, 1976, was allegedly an accomplice of the defendant, was outfitted with certain monitoring and recording devices by law enforcement authorities. While so outfitted, certain conversations between he and the defendant were monitored and recorded. When the government sought to introduce the contents of those recordings into evidence, the defendant moved to suppress on grounds that various portions of the taped conversations dealt with certain irrelevant and highly prejudicial matters as well as unrelated alleged criminal activities of the defendant Lind. (T. 1029-1084).

The Court sustained the defendant's objection with respect to all but one of the passages which dealt with unrelated crimes. That passage was contained in a tape of a conversation between Lake and the defendant on October 4, 1975. It stated as follows:

> "Defendant: Hey, now, listen. You got to watch it. They could pull you in and question you about this fire they had down there."
>
> "Lake: Do you know anything about that thing?"
>
> "Defendant: No, do you?"
>
> "Lake: Oh no I was at home with the old lady in bed."

"Defendant: They got the prosecutor's office you know. That's who they burned. They burned his office."

"Lake: Yeah. Well—"

"Defendant: We'll send him a get well card or something. In the meantime go ahead." (T. 1037).

As stated above, the trial court overruled the defendant's motion with respect to the admissibility of that portion of the tape reasoning that its relevance with respect to Counts VIII and IX (obstruction of justice) outweighed its prejudicial effect.

The Court of Appeals for the Seventh Circuit agreed with petitioner's claim that the trial court abused its discretion in admitting the above quoted portion of the taped conversations but held, however, that since it was but a brief item in extensive recordings and considering it in relation "to the total evidence which tended to show the guilt of the defendant" it did not affect the Petitioner's substantial rights, and was thus "harmless error." (Appendix A at 19).

Reasons for Granting the Writ

THE STANDARDS UTILIZED BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN HOLDING THAT THE ADMISSION OF THE HIGHLY PREJUDICIAL AND IRRELEVANT EVIDENCE WAS "HARMLESS ERROR" IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is clear upon a reading of the decision of the Court of Appeals in the instant case, that when determining whether the trial court's erroneous ruling was reversible, the standard applied was merely an assessment of the evidence against the Petitioner excluding the improperly admitted evidence. Admitting, essentially, that the evidence in question was prejudicial since it "reflected a callous attitude on the part of the [petitioner] for the prosecutor" (Appendix A at 18), the Court of Appeals held

that "considered in relation to the total evidence which tended to show the guilt of the defendant," the error did not affect the substantial rights of the defendant.

It is submitted that the standards utilized by the Court of Appeals was in conflict with the applicable decisions of this Court. *See Harrington* v. *California,* 395 U.S. 250 (1969); *Chapman* v. *California,* 386 U.S. 18 (1967); *Kotteakos* v. *United States,* 328 U.S. 750 (1946).

The standards enunciated by this Court in both *Harrington* and *Chapman* show clearly that the crucial question is *not,* as the Court of Appeals below thought it to be, whether it is clear beyond a reasonable doubt that a jury would have convicted the petitioner if it had not been confronted with the erroneously admitted evidence. Rather, the test must be whether the Appellate Court is convinced beyond a reasonable doubt that the illegally admitted evidence did not contribute to the verdict or, alternatively, that it did not adversely affect some members of the jury. Thus, the crucial question is the impact of the tainted evidence on the jury, not the weight and sufficiency of the remaining, untainted evidence. Indeed, it is clear that this Court in *Chapman* explicitly turned away from the "overwhelming evidence test" utilized by the Court of Appeals below, and opted for the test set forth in *Fahey* v. *Connecticut,* 375 U.S. 85 (1963); that is, "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87.

Even when the less strict standard found within this Court's decision in *Kotteakos,* is to be utilized, the use of the "overwhelming evidence test" is improper. In *Kotteakos,* this Court stated that

> it is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . . Those judgments are exclusively for the jury. . . .

> But this does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. . . . In criminal causes that outcome is conviction. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather, what effect error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. . . .
>
> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict on judgment should stand. . . .

328 U.S. at 364-65 (citations omitted).

The above standard as well as those found within *Chapman* and *Harrington, supra,* differ radically from the improper "overwhelming evidence of guilt" test that the Court of Appeals below utilized in affirming the Petitioner's conviction.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted to determine whehter the Court of Appeals for the Seventh Circuit is contrary to the applicable decisions of this Court.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(Argued June 14, 1977)

No. 76-1938

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,
v.
JOHN DAVID LIND,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

IP-76-61-CR
Gale J. Holder, *Judge*

Before
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Robert A. Sprecher, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*

ORDER
August 8, 1977

In this criminal appeal, defendant John David Lind (hereinafter referred to as defendant) raises two issues for our consideration. Defendant first argues that he was denied his right to a fair and impartial trial when the district judge refused to grant defendant's Motion to Recuse. Defendant also asserts that the district judge com-

mitted reversible error when he allowed into evidence prejudicial portions of a taped conversation between defendant and Gary W. Lake. For the following reasons, we affirm the conviction of the defendant.

The facts are briefly as follows:

On September 28, 1975, the Plumb-Rite Supply Company facility in Anderson, Indiana, was bombed. A short time after the bombing, Gary W. Lake and his wife Joanna C. Lake were taken into custody for questioning concerning the bombing. As the investigation proceeded, defendant also became implicated in the bombing. Gary Lake, who cooperated in the investigation of defendant, wore a small electronic body transmitter and recorded several conversations with defendant. On October 21, 1975, Lake disappeared. Lake's partially dismembered body was found floating in a pond near Lapel, Indiana, on October 21, 1975.

Defendant on April 21, 1976, was charged in a nine count indictment with illegal possession and use of explosives and obstruction of justice. Trial before a jury was begun on July 22, 1976. At the conclusion of the Government's case, defendant's Motion for a Judgment of Acquittal was granted with respect to Counts III and IV (willful and knowing use of a firearm to commit a felony) and Count VIII (conspiracy to obstruct justice). Thereafter, the jury returned a verdict of guilty with respect to Counts I (conspiracy to commit the following offenses: 1) destruction by means of an explosive material of the Plumb-Rite Supply Corporation facility; 2) storing and concealing explosive materials with reasonable knowledge that the explosive material is stolen; 3) willful and knowing possession of a firearm which has not been registered; and 4) willful and knowing use of a firearm to commit a felony), Count II (possession of unregistered firearms), Count V (attempt on September 27, 1975, to destroy by means of an explosive the Plumb-Rite Supply Corporation facility), Count VI

(attempt on September 28, 1975, to destroy by means of an explosive the Plumb-Rite Supply Corporation facility), and Count VII (storing and concealing explosive material with reasonable knowledge that the explosive material is stolen). The jury returned a verdict of not guilty on Count IX (obstruction of justice).

On September 10, 1976, the district court sentenced defendant to imprisonment for a period of five years on Count I and nine years on Counts II, V, VI, and VII. The court ordered that the sentences be served concurrently. In addition, the court fined defendant $10,000 plus court costs.

1. *Motion To Recuse.*

The district judge set bail for defendant at $750,000.00. Defendant on April 22, 1976, filed a Verified Petition for Reduction of Bond. A hearing was held on April 22, 1976, to consider defendant's motion to reduce bail.

At this hearing, defendant relied solely on his verified petition to support his motion. The verfied petition alleged the following: 1) defendant was a duly licensed physician for ten years, admitted to practice in Indiana with offices in Anderson, Indiana; 2) defendant resided in Anderson and had lived in Madison County, Indiana, for the past six years; 3) defendant was 35 years of age, married with four children, and had no prior criminal record; 4) defendant had been aware that he was a prime target of criminal investigations since November, 1975, but defendant had not fled the jurisdiction; 5) defendant's counsel had offered the United States Attorney to surrender defendant upon request but the United States Attorney chose to arrest defendant a his home in Anderson, Indiana; and 6) defendant's attorney assured the court that defendant would appear for all court proceedings. In order to ensure that prejudicial pretrial publicity would not affect his speedy trial rights, defendant's petition also requested either that

the Government be required to submit objections to lowering bail in writing or that a hearing be held *in camera*. The court granted defendant's request for an *in camera* hearing.

The Government sought to cross-examine defendant on defendant's claim in the fourth item of his verified petition. Rather than permit the defendant to be cross-examined, the court took judicial notice of prior hearings which had been conducted on defendant's motions to suppress Grand Jury subpoenas. Defendant's attorney in summarizing for the court the evidence adduced in these hearings stated in part:

> As best memory serves me, their presentation of evidence was with regard to Dr. Lind and the instigation by him of requesting that Dr. Lind's office be examined and his records be examined.
>
> There was evidence from Mr. Hugentober as to some involvement in drugs, bombings, and all sorts of things.
>
> I don't think there was any evidence of the doctor at that hearing, that evidence, that they believed him to be a prime target of this investigation. I can't recall the exact words, but I know those were things that were brought out. (Tr. 10).

Neither side objected to the court taking judicial notice of this evidence.

In opposing defendant's motion for reduction of bail, the Government introduced at the April 22 hearing the testimony of two special agents of the Bureau of Alcohol, Tobacco and Firearms. The special agents testified as to statements made to them by William Pinyon, Jr., Gary W. Lake, and James R. Farrington. According to the agents, Pinyon, Lake and Farrington stated that they had performed acts of arson, burglary, vandalism, and attempted assassination on behalf of defendant. Defendant's objection to this testimony on the grounds of relevancy was overruled by the court. (Tr. 15-16).

The district judge on April 23, 1976, denied defendant's motion for reduction of bail. The court's order provided in part:

> The movant rested on his affidavit and introduced no evidence other than his verified petition for reduction of bond.
>
> The Government introduced evidence through the testimony of Agents who had conducted a part of the investigation. Government Agents testified that extensive interviews had been conducted in the Anderson, Indiana area and that the Government had compiled statements to the effect that the movant had contracted out and had perpetrated arson, burglaries, vandalism, an attempted murder of a Madison County physician, an attempted murder of a Henry County physician, and other crimes in addition to the charge filed in the above-captioned cause.
>
> The Government Agents testified that some of the persons who had committed crimes for the movant had testified before the Grand Jury.
>
> Further, the Agents testified that two physicians with whom the movant had been associated were afraid for their personal safety. One such physician informed the Agents that he had sustained an attempt on his life.
>
> The Government offered in evidence, without objection from the movant, a copy of a criminal affidavit filed in Henry County, captioned State of Indiana v. James R. Farrington, S-75-CR-87. Attached to the aforementioned exhibit was a detailed statement by James R. Farrington and Gary W. Lake, who had committed an attempted murder at the request of the movant.

The testimony concerning Lind's involvement in the above criminal activities was not controverted by any evidence presented by the movant. The Government offered a stipulation to the effect that the movant holds a valid passport, that he travelled to Germany within the last year and that he remained in that country for a period of time. The movant agreed to the stipulation as offered and it was accepted by the Court.

The Government moved the Court to take judicial notice of hearings before the Court on February 26, 1976 and February 28, 1976 wherein evidence was adduced to the effect that John D. Lind was a suspect in the murder of Gary W. Lake (who is mentioned above as having attempted a murder for the movant), and that he was investigated for drug related offenses. Evidence was also adduced that the movant paid a large sum of money to an attorney to represent him in November of 1975.

The district judge filed the order denying defendant's motion for reduction of bail with the Clerk's Office for the Southern District of Indiana.

Defendant on June 16, 1976, filed a verified affidavit in support of his motion to recuse.[1] Defendant pointed to the following factors to support this motion: 1) the court became biased against defendant after hearing prejudicial evidence concerning alleged criminal acts of defendant in the hearing on defendant's motion to lower bail; 2) the court's bias against defendant was evidenced by the public filing of the order of April 23, 1976, which denied defend-

[1] Defendant initially filed a motion to recuse pursuant to 28 U.S.C. § 144 on June 1, 1976. The motion was not, however, supported by an affidavit or a certification of counsel as is required by 28 U.S.C. § 144. After the government pointed out the technical defects of the motion, defendant filed the verified affidavit in support of the motion to recuse on June 16, 1976.

ant's motion for reduction of bail; and 3) although defendant had not been charged with any of the alleged other crimes discussed in the hearing on the motion to lower bail, defendant alleged that the court denied the motion to lower bail because the court believed that defendant was implicated and perhaps even guilty of the other crimes.

The district judge denied defendant's motion to recuse on June 17, 1976.

Defendant asserts on appeal that the district judge erred in not granting the motion to recuse. Defendant reasserts that information imparted to the lower court by the government in opposing the motion to reduce bail caused the district judge to prejudge defendant's guilt not only as to the charges for which he was on trial but also for the other alleged criminal activities of defendant which were raised in the hearing. Defendant contends that the court's prejudice was exhibited before, during and after the trial. Defendant asserts that bias was evidenced prior to trail when the court publicly filed with the clerk's office the order denying the defendant's motion to reduce bail. Defendant argues that the court erred in making public the other alleged criminal activities of defendant raised in the hearing since the *in camera* order was thereby rendered useless. The defendant also contends that the court in the order denying the motion for reduction of bail expressed its views as to defendant's involvement in the other crimes raised in the April 22 hearing. The district judge exhibited bias during trial, according to defendant, when he denied defendant's motions relating to admissibility of evidence unless defendant correctly stated the correct proposition of law. At the same time, the district judge allegedly supplied correct propositions of law to the Government in order to sustain the position of the Government with respect to admissibility of evidence. Finally, the court's bias was

allegedly shown after trial by the severity of the sentence in light of the fact that defendant had no prior criminal record.

"A judge when presented with a timely motion under § 144 must recuse himself if the motion alleges facts sufficient to show judicial bias even though he may know them to be entirely false." *United States* v. *Jeffers,* 532 F.2d 1101, 1112 (7th Cir. 1976); *United States* v. *Patrick,* 542 F.2d 381 (7th Cir. 1976), *cert. denied,* 45 L.W. 3634. The court is entitled to pass on the legal sufficiency of the affidavit but all factual allegations must be taken as true. *Action Realty Co.* v. *Will,* 427 F.2d 843 (7th Cir. 1970); *United States* v. *Ming,* 466 F.2d 1000 (7th Cir. 1972), *cert. denied,* 409 U.S. 915. "A trial judge has as much obligation not to recuse himself when there is no occasion for him to do so as there is for him to do so when the converse prevails." *Ming,* 466 F.2d at 1004; *Will,* 427 F.2d at 845. A judge is presumed to be impartial and unless facts are presented in the affidavit alleging personal as opposed to judicial bias, a judge need not recuse himself. *Patrick,* 542 F.2d at 390. Facts learned by a judge in his judicial capacity cannot be the basis for recusal. *Patrick* 542 F.2d at 390. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicail source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.,* 384 U.S. 563, 583 (1966); cited in *United States* v. *English,* 501 F.2d 1254, 1263 (7th Cir. 1974), *cert. denied,* 419 U.S. 1114. Thus, the fact "that the judge might have formed an opinion concerning the guilt or innocence of the defendant from the evidence presented at an earlier trial involving the same person is not the kind of bias or prejudice which requires disqualification." *United States* v. *Dichiarinte,* 445 F.2d 126, 132 (7th Cir. 1971). Similarly, "inferences drawn" from prior

judicial determinations are insufficient grounds for recusal because it is the duty of the judge to rule upon issues of fact and law and questions of conduct which happen to form a part of the proceedings before him." *United States* v. *Partin,* 312 F.Supp. 1355, 1358 (E.D. La. 1970); cited in *Jeffers,* 532 F.2d at 1112; *English,* 501 F.2d at 1263.

Defendant's primary argument for recusal is that the court became biased as a result of evidence introduced by the government at the bail reduction hearing. Since this information was acquired by the court in a judicial proceeding in the process of making a judicial determination, recusal is not required.[2] In addition, we do not find after examining the court's order denying reduction of bail that the lower court exhibited bias by expressing an opinion as to the guilt of defendant for other crimes. On the contrary, the court merely summarized evidence presented at the bail reduction hearing. We also do not find that the court evidenced bias by filing the April 23 order with the clerk's office. The defendant has not contested the accuracy of the district judge's statement in his order denying defendant's Motion to Recuse that the testimony of the two Government agents covered, in large part, information which had been publicly covered in the news media prior to the date of the hearing. In addition, the district judge also stated that the judicial hearings of which the court took judicial notice were public hearings.[3] Finally, upon

---

[2] Defendant has suggested that the hearsay nature of the testimony in some manner affects the question of recusal. We disagree. The rules of evidence do not limit the information which may be considered in determining what conditions, if any, may be imposed on release prior to trial. 18 U.S.C. § 3146(f); *United States* v. *Wind,* 527 F.2d 672, 675 (6th Cir. 1975); Wright, Federal Practice and Procedure, § 764, p. 258.

[3] Defendant contended at oral argument that since it was illogical for the court to first hold an *in camera* hearing on bail reduction and then summarize the evidence in an order publicly filed, filing the order in the clerk's office evidenced judicial bias. We

review of the record, we do not find that evidentiary rulings by the court during trial, the length of sentence or the court's conduct in the sentencing hearing evidenced judicial bias. On the contrary, lack of judicial bias for defendant was shown both by the court's order of July 12, 1976, which granted defendant's motion pursuant to Fed. R. Crim. P. 21(a) for transfer of the case to another district and by the ruling of the district judge at the conclusion of the Government's case which granted defendant's Motion for Judgment of Acquittal as to Counts III, IV and VIII.

2. *Admission of taped conversation between defendant and Lake.*

Except for sections ruled inadmissable, tape recordings of conversations between defendant and Lake were introduced into evidence. The district judge overruled defendant's objection to the following portion of one of the taped conversations:

"Dr. Lind: Hey, now, listen. You got to watch it. They could pull you in and question you on this big fire they had down there."

"Mr. Lake: Do you know anything about that thing?"

"Dr. Lind: No, do you?"

"Mr. Lake: Oh, no. I was at home with the old lady in bed."

"Dr. Lind: They got the Prosecutor's office, you know. That's who they burned. They burned his office."

---

disagree. The district court in the June 17, 1976, order denying the defendant's Motion to Recuse stated that the hearing was held *in camera* because the court believed that when "the defendant Lind took the witness stand, a number of matters might be covered during that testimony, which had not been made public or were otherwise openly known." Defendant, however, did not take the witness stand. Since the court did not find that new matters had been uncovered in the hearing, the district judge did not act illogically in filing the order with the clerk's office.

"Mr. Lake: Yeah. Well—"

"Dr. Lind: We'll send him a get well card or something. In the meantime, go ahead."

(Tr. 1037).

Defendant argues that the court abused its discretion in admitting his portion of the taped conversations. Defendant contends that the tape recording made reference to a crime other than the crime for which the appellant was being tried and that the prejudicial effect of this conversation outweighed any possible probative value. Defendant also asserts that this argument must be considered in conjunction with the prejudice injected into the trial by the suggestion that defendant had some involvement in Lake's death.

The Government argues, on the other hand, that the objected to conversation does not contain evidence of other crimes since there is nothing in the conversation which indicates that either defendant or Lake set the fire.[4] The Government contends that the taped conversation was relevant to the counts dealing with obstruction of Justice since it tended to show that defendant did not want Lake to be unaware that he might be questioned by police about the fire in the prosecutor's office. According to the Government, this supports an inference that defendant did not want Lake questioned about the fire or anything which might be under investigation. As an alternative theory, the Government argues that even an attempt to keep Lake from talking about a crime in which he was not involved was part of the obstruction of justice counts.

---

[4] The Government argues that defendant objected at trial only to the relevancy of this conversation. Although the transcript indicates that Mr. Bailey objected only to the relevance of this conversation (Tr. 1050), Mr. Shaw, defendant's co-counsel, apparently objected that the conversation constituted proof of other crimes .(Tr. 1050-51).

We do not believe that the objected to portion of the taped conversation can properly be considered as evidence of a different crime. The Government pointed out to the district judge, and Mr. Bailey, counsel for the defendant, agreed during trial, that the conversation between defendant and Lake did not evidence the existence of another crime. (Tr. 1050). On the contrary, both defendant and Lake denied any knowledge of the fire. Similarly, there is no link between the fire and defendant or Lake.

We find, however, that the Government's contention that the taped conversation is relevant to the obstruction of justice and conspiracy to obstruct justice counts is without merit. The test for relevancy is "whether proffered evidence has a tendency to make the existence of a fact more or less probable than would be the case without benefit of the evidence." *United States* v. *Carter*, 522 F.2d 666, 685 (D.C. Cir. 1975) (footnote omitted); 28 U.S.C. Rule 401. The Government contends that defendant's cautionary remarks to Lake as to the possibility of being questioned about the fire in the prosecutor's office gives rise to an inference that defendant did not want Lake questioned about the fire or anything which might have been under investigation. Although defendant may not have wanted Lake to be questioned about anything under investigation, defendant's statements about the fire in the prosecutor's office in no way tends to prove that defendant was attempting to block communication about the fire to the Government by means of bribery, misrepresentation, force, threats, or intimidation. In fact, as previously pointed out, Lake stated that he had no knowledge concerning the fire. In addition, defendant's statement that "We'll send him a get well card or something" is in no way relevant to the obstruction of justice counts. That statement only reflected a callous attitude on the part of defendant for the prosecutor. In sum, we do not see how the taped conversation

which discussed a collateral incident tended to show that defendant acted to obstruct justice. Thus, we find that the district judge abused his discretion in admitting into evidence the objected to portion of the taped conversation.

We do not find, however, that the lower court's error in admitting the taped conversation into evidence requires a new trial. This conversation was a brief item in extensive recordings of taped conversations which were admitted into evidence. In addition, when considered in relation to the total evidence which tended to show the guilt of defendant, we cannot say that substantial rights of the defendant have been affected. This is especially true in view of the fact that the court granted the defendant's Motion for Judgment of Acquittal on Count VIII (conspiracy to obstruct justice) and the jury returned a verdict of not guilty on Count IX (obstruction of justice). Since substantial rights of the defendant have not been affected, we find this to be harmless error.

Finally, after reviewing the testimony of Mrs. Lake, we do not find that this result is affected by the evidence of Lake's death which was admitted during trial.[5]

For the foregoing reasons, the conviction of defendant is hereby affirmed.

---

[5] The parties agreed to the following stipulation concerning Lake's death:

> The Court: That Gary W. Lake is the same one named in the Indictment and the same person whose voice is recorded on the tapes, is deceased;
>
> That the date of death is unknown, but that the parties agree that it was after eight p.m. October 21, 1975 and prior to the expiration of November 9, 1975;
>
> That he did not die of any illness complained of or related to the conversations on the tapes.
>
> The parties further agreed that they would make no argument whatsoever suggesting a cause of death or speculating upon it.

APPENDIX B

CHAPTER 19 — CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

* * *

CHAPTER 40

§ 842.

(h) It shall be unlawful for any person to receive, conceal, transport, ship, store, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such explosive materials were stolen.

(i) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana (as defined in section 4761 of the Internal Revenue Code of 1954) or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any explosive in interstate or foreign commerce or to receive any explosive which has been shipped or transported in interstate or foreign commerce.

* * *

§ 844.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

* * *

CHAPTER 44

§ 924.

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than

twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

* * *

CHAPTER 73

§ 1510. Obstruction of criminal investigations.

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

* * *

§ 5861. Prohibited acts

It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;

* * *

§ 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.